

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL J. MAJOR,

Plaintiff,

v.

INTERNAL REVENUE SERVICE OF THE
U.S.; DEPARTMENT OF TREASURY;
GREGORY M. HAHN individually and in
his capacity as IRS employee; CHARLES
JOSHUA individually and in his capacity as
IRS employee; JACQUELINE CHOWNING
individually and in her capacity as IRS
employee,

Defendants.

No. C05-1038Z

ORDER

This matter comes before the Court on Defendants' motion to dismiss, docket no. 8. On June 7, 2005, Michael J. Major (Plaintiff) filed a complaint naming as Defendants the Internal Revenue Service (IRS) and three individual IRS employees: 1) Gregory Hahn, an IRS attorney in Seattle; 2) Charles Joshua, an IRS auditor; and 3) Jacqueline Chowning, an IRS revenue officer. Plaintiff alleges various RICO conspiracy and constitutional violation against Defendants including: 1) failure to respond to Plaintiff's requests for information; 2) harassment/retaliation; 3) destruction of documents; 4) forgery on Plaintiff's 1999 IRS Form 1040; and 5) submission of the forged 1999 return to the Tax Court. Plaintiff seeks injunctive relief and monetary relief for "compensatory and other damages" in the amount of at least \$1.7 million for intentional infliction of emotional distress.

1 The IRS selected Plaintiff's 1999 income tax return for audit in July 2001. Defendant
2 Joshua was assigned to verify the number of Plaintiff's dependent exemptions and items
3 contained within Schedule C of the return. Through written correspondence, Defendant
4 Joshua requested substantiation for various items. It is undisputed that Plaintiff did not
5 provide substantiation, but Plaintiff alleges that he wrote a letter stating that the applicable
6 documents were lost and that he would reconstruct them.

7 In October 2001, Plaintiff sent Defendant Joshua an offer-in-compromise (OIC).
8 Initially, Defendant Chowning was assigned to review the OIC, and she determined that the
9 offer might be acceptable if it was restricted to his liabilities for tax years 1995 and 1997.
10 However, Plaintiff alleges that the OIC was to include tax year 1999, and insisted that
11 Defendant Chowning include his 1999 liabilities. Defendant Chowning consulted with
12 Defendant Joshua regarding the ongoing 1999 audit, and Defendant Chowning also requested
13 that Plaintiff substantiate his business expenses. After researching Plaintiff's audit and not
14 receiving any substantiation, Defendant Chowning determined that compromise was
15 unwarranted and rejected the OIC because Plaintiff could possibly fully pay the debt.

16 Defendant Joshua's audit resulted in the IRS issuing a notice of deficiency to Plaintiff
17 for tax year 1999 because Plaintiff was not entitled to certain dependency deductions on his
18 Form 1040. Plaintiff's 2000 return was also audited and resulted in a notice of deficiency.
19 Through Plaintiff's petition, both cases were combined and are currently pending in the
20 United States Tax Court. See Docket Report, Michael Joseph Major v. Commissioner,
21 Docket Nos. 16592-02 & 6343-03 (T.C. filed Oct. 23, 2002 and Apr. 29, 2003). Defendant
22 Hahn is counsel for the IRS in that litigation. Notably, the Tax Court denied Plaintiff's
23 motion for summary judgment holding that Plaintiff's allegation of misconduct by
24 Defendants Hahn, Joshua, and Chowning were without merit.

25 Defendants grounds for their instant motion to dismiss are: 1) improper service of
26 process; 2) lack of subject matter jurisdiction/sovereign immunity; and 3) failure to state a

claim. Plaintiff timely responded to Defendants' motion to dismiss and simultaneously filed a motion for partial summary judgment, docket no. 11, against Defendant IRS.

I. DEFENDANTS' MOTION TO DISMISS

A. Motion to Dismiss Individual Defendants

When considering a motion to dismiss, the Court must "treat all of the well-pleaded allegations of the complaint as true." Miree v. DeKalb County, 433 U.S. 25, 27 n.1 (1977); see also Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992). The Court must construe all the allegations in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). It must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

1. Bivens Claim

In the present case, Plaintiff sued individual Defendants in their personal and individual capacity. Plaintiff alleges violation of his constitutional right to due process. The Court therefore construes Plaintiff's complaint as an action under Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971), which allows, in certain circumstances, a suit for damages to be maintained against a federal actor in his or her individual capacity for alleged violation of constitutional rights. This is similar to an action under 42 U.S.C. § 1983, except that section 1983 applies to state officials, whereas Bivens applies to federal officials. Christian v. Crawford, 907 F.2d 808, 810 (8th Cir. 1990). Incidentally, Plaintiff's statement in his response that "I never evoked Bivens..." does not change the true character of his suit.

The Plaintiff alleges that his constitutional rights were violated by the individual Defendants' actions when: 1) auditing his 1999 Form 1040; 2) processing his OIC; and 3) appearing as counsel for the IRS in Plaintiff's pending Tax Court case. However, these

1 alleged actions of Defendants are well within the tax-related scope of their official duties as
 2 IRS employees. See Christensen v. Ward, 916 F.2d 1462, 1476 (10th Cir. 1990)(“Decisions
 3 to initiate, prosecute or continue proceedings such as audits and assessments are the official
 4 duties of IRS agents”). As such, a Bivens action is inapplicable in this case because
 5 Congress has created specific remedies under a comprehensive scheme¹ where alternatives to
 6 suits for damages against federal actors are available to resolve tax-related disputes. See
 7 Adams v. Johnson, 355 F.3d 1179, 1185 (9th Cir. 2004) (holding that no Bivens remedy is
 8 available for alleged constitutional violations in the assessment and collection of taxes).

9 Congress has provided a statutory damages remedy for the reckless or intentional
 10 disregard of Internal Revenue Code provisions by IRS employees when collecting taxes. See
 11 26 U.S.C. § 7433.² Furthermore, Congress unequivocally stated that § 7433 is “the exclusive
 12 remedy for recovering damages resulting from such actions.” 26 U.S.C. § 7433(a). This
 13 provision does not mention constitutional violations; however several other circuits have
 14 concluded that § 7433 precludes Bivens actions against IRS agents for due process
 15 violations. Vennes v. An Unknown Number of Unidentified Agents, 26 F.3d 1448, 1454
 16 (8th Cir. 1994); McMillen v. United States Dep't of Treasury, 960 F.2d 187, 190 (1st Cir.
 17 1991); Cameron v. Internal Revenue Service, 773 F.2d 126 at 129 (7th Cir. 1985); National
 18 Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240, 1248 (10th Cir. 1989). Moreover, the
 19 Ninth Circuit has “never recognized a constitutional violation arising from the collection of
 20 taxes.” Wages v. Internal Revenue Service, 915 F.2d 1230, 1235 (9th Cir. 1990). As such,

22 ¹Specific alternative provisions are in place to resolve tax-related disputes. For example,
 23 26 U.S.C. § 7433 provides a cause of action for damages sustained as a result of unauthorized
 24 action to collect federal taxes; and 26 U.S.C. § 7432 provides a cause of action against the
 United States for actual economic damages if an IRS officer knowingly or negligently fails to
 release a lien under 26 U.S.C. § 6325.

25 ²26 U.S.C. § 7433(a) permits a suit for damages against the United States “[i]f, in
 26 connection with any collection of Federal tax with respect to a taxpayer, any officer or employee
 of the Internal Revenue Services recklessly or intentionally disregards any provision of this title,
 or any regulation promulgated under this title.”

1 Plaintiff's attempt to sue individual Defendants, who were clearly acting within their official
2 capacity, is precluded by the alternate remedies that deal with tax-related disputes,
3 specifically 26 U.S.C. § 7433(a).

4 Plaintiff does not have an actionable Bivens claim for violation of due process.
5 Moreover, Plaintiff has chosen not to invoke his proper remedies and cannot prove any set of
6 facts which would entitle him to relief in this matter. Accordingly, pursuant to Fed. R. Civ.
7 P. 12(b)(6), the Court concludes that Plaintiff fails to state a claim against the individual
8 Defendants.

9 **2. Qualified Immunity**

10 Even if Plaintiff was capable of sufficiently pleading a Bivens claim, Defendants
11 Joshua and Chowning are entitled to qualified immunity. Qualified immunity protects all
12 federal officers when performing discretionary functions, unless the particular defendant
13 violation "clearly established statutory or constitutional rights at the time the challenged
14 action occurred of which a reasonable person would have known." Harlow v. Fitzgerald,
15 457 U.S. 800, 818 (1982). Qualified immunity is not merely a defense to liability; it is also
16 an immunity from suit. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Plaintiff bears the
17 burden of showing a violation of a "clearly established" constitutional right. Id. at 525
18 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a
19 defendant pleading qualified immunity is entitled to dismissal before the commencement of
20 the discovery"). Plaintiff argues that there was a violation of his constitutional rights
21 because Defendants are allegedly depriving him of "life, liberty, or property, without due
22 process of law" under both the V and XIV Amendments. He further alleges that Amendment
23 XIII is being violated because he is effectively being forced into slavery by the IRS. There is
24 no factual basis for Plaintiff's assertion; he has not been forced to provide any money or
25 property to the IRS as of this date. Moreover, the Ninth Circuit has never recognized a
26 constitutional violation arising from the collection of taxes, and there is no credible evidence

1 brought forth by Plaintiff to challenge that proposition. See Wages, 915 F.2d at 1235.

2 Therefore, Defendants Chowning and Joshua are entitled to qualified immunity.

3 **3. Absolute Immunity**

4 Again, even if Plaintiff could sufficiently plead a Bivens claim, similar to Defendants
5 Joshua and Chowning, Defendant Hahn is protected by immunity. Defendant Hahn is
6 entitled to absolute immunity for his actions in preparing and defending the Commissioner's
7 position in Tax Court. See Fry v. Melaragno, 939 F.2d 832, 837 (9th Cir. 1991). The
8 touchstone for finding this immunity is whether the attorney's actions are intimately or
9 closely associated with the judicial process. See Burns v. Reed, 500 U.S. 478, 485
10 (1991)("the filing of the allegedly false affidavit, and the inclusion of allegedly false
11 statements in the complaint and other pleadings are all actions which clearly fall within this
12 area of absolute immunity").

13 The submission of the allegedly forged tax return by Defendant Hahn falls within the
14 scope of this immunity. Additionally, "the proper forum for challenge to these allegedly
15 improper actions is in the adversary proceedings where they take place, or if warranted, in
16 professional disciplinary proceedings, not in a separate suit for damages. Fry, 939 F.2d at
17 838. The Tax Court has already ruled on this issue and found no misconduct on the part of
18 Defendant Hahn. Hence, the only proper forum for a challenge to these alleged actions
19 would be in a professional disciplinary proceeding. Therefore, even if the facts were
20 sufficient to support a Bivens claim, Defendant Hahn is protected by absolute immunity.

21 Defendants' motion to dismiss individual Defendants is GRANTED.

22 **B. Motion to Dismiss Defendant United States**

23 The only possible proper Defendant in this action is the United States because the IRS
24 employees were acting in their official capacity. See Dungan v. Rank, 372 U.S. 609, 622-23
25 (1962); Atkinson v. O'Neil, 867 F.2d 589, 590 (10th Cir. 1989)("[w]hen an action is one
26 against named individual defendants, but the acts complained of consist of actions taken by

1 defendants in their official capacity as agents of the United States, the action is in fact one
2 against the United States”). Nonetheless, Plaintiff has failed to state a claim against the
3 United States.

4 **1. Exclusive Remedy of § 7433**

5 **a. Failure to Exhaust Remedies**

6 26 U.S.C. § 7433 is the exclusive statute under which Plaintiff could bring an action
7 against the United States, but Plaintiff has failed to sufficiently plead facts that withstand
8 Defendants’ motion to dismiss. Plaintiff has failed to show that he has exhausted the
9 administrative remedies required by 26 U.S.C. § 7433(d). While he argues in his response
10 that he did exhaust his administrative remedies as evinced by his numerous correspondence
11 with various IRS officials, a large volume of correspondence does not equate to exhaustion
12 of remedies. There is no evidence that he filed any administrative claim(s) under Treasury
13 Regulation § 301.7433-1(e).

14 **b. Reckless or Intentional Disregard**

15 Furthermore, Plaintiff has failed to allege that an IRS employee “recklessly or
16 intentionally disregard[ed] any provision” of the Internal Revenue Code (IRC) or Treasury
17 Regulation. Plaintiff does state in his reply that he did allege that the IRS employees were
18 recklessly and intentionally disregarding all provisions of the IRC by virtue of the fact that
19 they were “using the color of legitimate procedures for purposes exactly the opposite for
20 which they were designed.” However, Plaintiff has only pled violations of RICO and
21 constitutional rights relating to his audit and OIC, which do not fall within the scope of the
22 IRC or Treasury Regulations. Wages, 915 F.2d at 1235 (holding that the Ninth Circuit has
23 “never recognized a constitutional violation arising from the collection of taxes”). Plaintiff
24 has not alleged with any specificity an IRC or Treasury Regulation that Defendant has
25 violated. Therefore, under Fed. R. Civ. P. 12(b)(6), Plaintiff has failed to state a claim
26

1 against the United States upon which relief can be granted.³

2 Defendants' motion to dismiss Defendant United States is GRANTED.

3 C. RICO Claim

4 Plaintiff broadly alleges that the Court "has legal jurisdiction under the . . . Racketeer
5 Influenced and Corrupt Organizations Act (RICO)" In response to Defendants' motion
6 to dismiss, Plaintiff specifically alleges that Defendants should be punished under 18 U.S.C.
7 § 1962 for "conducting or participating in the affairs of the enterprises through a pattern of
8 racketeering activity or collection of an unlawful debt."

9 Nonetheless, Plaintiff has failed to properly allege a RICO claim, which requires that
10 1) a person has engaged in 2) a pattern of racketeering activity 3) connected to the
11 acquisition, establishment, conduct, or control of an enterprise in order to state a claim under
12 § 1964(c). See Delta Truck & Tractor, Inv. v. J. 1. Case Co., 855 F.2d 241, 242, (5th Cir.
13 1988), cert. denied, 489 U.S. 1079 (1989). In particular, Plaintiff has failed to identify the
14 "enterprise." The enterprise cannot also be the RICO defendant; therefore, the individual
15 defendants cannot constitute the enterprise. See Switzer v. Coan, 261 F.3d 985 (10th Cir.
16 2001); Rae v. Union Bank, 725 F.2d 478, 480 (9th Cir. 1984).

17 Moreover, an enterprise requires some sort of structure, not simply a group of people
18 who get together and commit to a pattern of racketeering activity. See Jennings v. Emry, 910
19 F.2d 1443, 1440-41. Hence, any alleged conspiracy among the individual Defendants lacks
20 the requisite structure to be considered an enterprise. Consequently, Plaintiff's failure to
21 show the essential element of existence of an enterprise is fatal to his claim.

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23 ³Additionally, the Federal Tort Claims Act cannot serve as a basis for jurisdiction in a suit
24 against the United States inasmuch as the taxpayer has neither shown nor alleged that he has
25 filed the proper administrative claim with the IRS as required by 28 U.S.C. § 2675(a). See
26 Caton v. United States, 495 F.2d 635 (9th Cir. 1974). Moreover, the provisions of the Federal
Tort Claims Act specifically exclude claims based upon the performance of a discretionary
function by a government officer and claims arising with respect to the assessment and
collection of any tax. 28 U.S.C. § 2680(a) and (c). Hutchinson v. United States, 677 F.2d 1322,
1327 (9th Cir. 1982). Because Plaintiff's claim falls within this exception to the FTCA, this suit
is barred by sovereign immunity. See Capozzoli v. Tracey, 663 F.2d 654 (5th Cir. 1981).

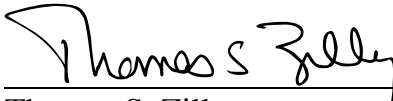
1 Defendants' motion to dismiss Plaintiff's RICO claim is GRANTED.

2 **II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

3 Plaintiff's motion for partial summary judgment, docket no. 11, is STRICKEN as
4 MOOT.

5 IT IS SO ORDERED.

6 DATED this 17th day of October, 2005.

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9 Thomas S. Zilly
10 United States District Judge
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